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# DEPORTING LEGAL ALIENS CONVICTED OF DRUNK DRIVING: ANALYZING THE CLASSIFICATION OF DRUNK DRIVING AS A "CRIME OF VIOLENCE"

## I. INTRODUCTION

Current immigration law provides for the deportation of "[a]ny alien who is convicted of an aggravated felony at any time after admission."<sup>1</sup> In 1996, with the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>2</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>3</sup> Congress drastically altered the legal landscape with respect to aggravated felonies.<sup>4</sup> In addition to expanding the number and types of crimes that are classified as aggravated felonies,<sup>5</sup> the 1996 laws subject aliens convicted of aggravated felonies to mandatory deportation.<sup>6</sup> As a result of this legislation, there has been a substantial increase in the likelihood of a lawful, permanent resident being deported following a criminal conviction.<sup>7</sup> Furthermore, deportation for an aggravated felony "applies regardless of whether the conviction was entered before, on, or after [the date of enactment]."<sup>8</sup> Not surprisingly, this retroactive application has resulted in profound consequences and has received substantial

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1. 8 U.S.C. § 1227(a)(2)(A)(iii) (2000). Section 1227 details numerous classes of aliens that are deportable including, but not limited to, aliens convicted of aggravated felonies or crimes of moral turpitude; aliens who are, or were anytime after admission, drug abusers or addicts; and aliens convicted of domestic violence crimes. § 1227(a).

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in various titles of the United States Code, including Titles 8 and 18).

3. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in various sections of Titles 8 and 18 U.S.C.).

4. See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000) (discussing the impact that the 1996 Acts have on aliens with criminal convictions).

5. See Brent K. Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697, 700 (1998).

6. See, e.g., Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 113 (1998); Morawetz, *supra* note 4, at 1936.

7. See Morawetz, *supra* note 4, at 1939; Morawetz, *supra* note 6, at 107.

8. 8 U.S.C. § 1101(a)(43) (2000).

criticism.<sup>9</sup>

In recent years, the United States Immigration and Naturalization Service (INS) has initiated deportation proceedings against legal aliens with drunk driving convictions under the premise that such offenses are aggravated felonies.<sup>10</sup> A number of aliens who were issued deportation orders resulting from drunk driving convictions have appealed, leading to a federal circuit court split.<sup>11</sup> The United States Courts of Appeals for the Tenth and Eleventh Circuits have held that drunk driving qualifies as an "aggravated felony" for deportation purposes, while the Second, Fifth, Seventh, and Ninth Circuits have held that it does not.<sup>12</sup>

While those aliens who commit serious crimes must be deported in order to protect the citizens of this country, deportation based upon drunk driving convictions is a disproportionate measure.<sup>13</sup> Deportation is a serious consequence, not only for the individual deported, but also for that individual's family. The United States Supreme Court considers deportation "a drastic measure and at times the equivalent of banishment or exile."<sup>14</sup> Considering the consequences of deportation, the government must consider whether drunk driving warrants such extreme action. While drunk driving is a serious problem in the United States, other possible punishments, such as imprisonment, fines, license revocation, and community service, are more proportional to the offense than deportation.

"[T]he issue of whether felony DWI [(Driving While Intoxicated)] is a crime of violence is one 'affecting hundreds if not thousands of

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9. See, e.g., Paige Krasker, Note, *Crimes of the Past Revisited: Legal Aliens Deported for Past Crimes Under the Retroactive Application of the Antiterrorism and Effective Death Penalty Act*, 22 SUFFOLK TRANSNAT'L L. REV. 109 (1998); Bruce R. Marley, Comment, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855 (1998); Anjali Parekh Prakash, Note, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420 (1997).

10. See, e.g., *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *Juan Olivares-Martinez*, 23 I. & N. Dec. 148 (B.I.A. 2001).

11. See *infra* Part III.A-B.

12. *Id.*

13. But see Julie Anne Rah, Note, *The Removal of Aliens Who Drink and Drive: Felony DWI as a Crime of Violence under 18 U.S.C. § 16(b)*, 70 FORDHAM L. REV. 2109, 2148 (2002) (arguing that "[f]elony DWI is a sufficiently violent and dangerous offense to warrant removal as a crime of violence.").

14. *Fong Haw Tanan v. Phelan*, 333 U.S. 6, 10 (1948) (citing *Delgadillo v. Carmichael*, 332 U.S. 388 (1947)).

aliens."<sup>15</sup> Given the importance of this issue, the serious nature of deportation, and the federal circuit court split, the Supreme Court may ultimately need to determine whether drunk driving qualifies as an aggravated felony under federal law, thus subjecting non-citizens to deportation.<sup>16</sup> If the Court is presented with this question, it should hold that drunk driving is not a deportable offense, based on both statutory analysis and social policy concerns.

Part II of this Comment will discuss immigration statutes with respect to deportation, and their application in recent years. Part III of this Comment will discuss and compare the cases arising out of the federal circuits that have established the circuit split regarding whether drunk driving qualifies as an aggravated felony. Part IV of this Comment will analyze these cases, concluding that a drunk driving conviction should not be considered an aggravated felony for purposes of deportation under current immigration law. Additionally, Part IV will discuss the social policy reasons supporting the conclusion that aliens should not be deported on the basis of drunk driving convictions.

## II. OVERVIEW AND APPLICATION OF DEPORTATION STATUTES

The United States Code details the offenses for which an alien may be deported.<sup>17</sup> One such provision states that an alien is deportable if he or she "is convicted of an aggravated felony at any time after admission" into the United States.<sup>18</sup> An aggravated felony is defined as "a crime of violence . . . for which the term of imprisonment [is] at least one year,"<sup>19</sup> among other specifically enumerated crimes.<sup>20</sup> The Code further provides that a crime of violence is:

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15. Rah, *supra* note 13, at 2111 (quoting *United States v. Chapa-Garza*, 262 F.3d 479, 480 (5th Cir. 2001) (Barksdale, J., dissenting)).

16. See Patricia Mason, *DUI Crash Not 'Violent Crime': Appeals Court*, CHI. DAILY L. BULL., July 6, 2001, at 1.

17. 8 U.S.C. § 1227(a) (2000).

18. § 1227(a)(2)(A)(iii).

19. 8 U.S.C. § 1101(a)(43)(F) (2000).

20. See § 1101(a)(43)(A)-(U) for a list of the specific crimes deemed to be aggravated felonies that expose an alien to deportation if convicted. For example, murder, rape, and sexual abuse of a minor are all categorized as aggravated felonies. § 1101(a)(43)(A). Additionally, theft and burglary offenses with terms of imprisonment of one year or more are considered aggravated felonies. § 1101(a)(43)(G). In addition, "an attempt or conspiracy to commit" any offense, including a crime of violence, under § 1101(a)(43) qualifies as a deportable aggravated felony. § 1101(a)(43)(U).

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.<sup>21</sup>

When determining whether a crime constitutes an aggravated felony, courts do not look to the defendant's actual conduct, but rather consider whether the particular statute under which he or she was convicted embodies conduct that constitutes an aggravated felony.<sup>22</sup> When applying this categorical approach, "the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant."<sup>23</sup> Either physical force must be an element of the offense or "the nature of the crime—as evidenced by the generic elements of the offense—must be such that its commission ordinarily would present a risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or harm actually occurs."<sup>24</sup>

Applying these statutes in contexts other than drunk driving provides helpful background information and demonstrates that deportation based upon a drunk driving conviction is disproportionate to the severity of the crime. The United States Court of Appeals for the Ninth Circuit held that a conviction for involuntary manslaughter under California law constitutes a crime of violence and is thus an aggravated felony.<sup>25</sup> Applying the categorical approach, the court stated that 18

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21. 18 U.S.C. § 16 (2000).

22. *E.g.*, *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001); *Park v. INS*, 252 F.3d 1018, 1021 (9th Cir. 2001) (citing *United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172 (9th Cir. 2000)); *Tapia-Garcia v. INS*, 237 F.3d 1216, 1222–23 (10th Cir. 2001); *Rah*, *supra* note 13, at 2122. This approach is employed due to the "by its nature" language used in section 16(b). *Id.*

23. *Dalton*, 257 F.3d at 204 (quoting *Michel v. INS*, 206 F.3d 253, 270 (2d Cir. 2000) (Calabresi, J., dissenting)).

24. *Gonzalo Palacios-Palacios*, No. A90-284-849, 1998 BIA LEXIS 44, at \*4–5 (Dec. 18, 1998), 22 I. & N. Dec. 434 (B.I.A. 1998).

25. *Park*, 252 F.3d at 1021. Eun Kyung Park was convicted of involuntary manslaughter under California Penal Code Section 192(b) for her participation in the death of a young woman who was beaten during a religious ceremony conducted to exorcize demons. *Id.* at 1020. Park was sentenced to three years in state prison. *Id.*

U.S.C. § 16(a) would "not apply because the 'use, attempted use, or threatened use of physical force' is not an element of involuntary manslaughter."<sup>26</sup> However, following a previous Ninth Circuit decision under a different, but almost identical statute, the court held that involuntary manslaughter is a crime of violence under § 16(b) because the offense, by its nature, involves physical force against a person.<sup>27</sup> In making this determination, the court rejected the contention that § 16(b) "requires a substantial risk that physical force may be used *intentionally* in the course of committing the offense."<sup>28</sup> Instead, the court held that it suffices to have a reckless mens rea to satisfy either § 16(a) or § 16(b).<sup>29</sup>

The Board of Immigration Appeals (BIA) in *Gonzalo Palacios-Pinera* determined that a conviction for first-degree arson under the laws of Alaska qualifies as a crime of violence, and is therefore a deportable offense.<sup>30</sup> The arson statute under which Palacios-Pinera was convicted states in pertinent part that "[a] person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury."<sup>31</sup> The BIA held that this act of arson, by its very nature, presents a substantial risk of physical force against another's person or property, and thus is a crime of violence under § 16(b).<sup>32</sup>

However, in *Francis v. Reno*,<sup>33</sup> the Third Circuit held that a misdemeanor conviction for vehicular homicide in Pennsylvania was not a crime of violence.<sup>34</sup> Robert Francis, a Jamaican citizen and a legal

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26. *Id.* at 1022 n.4 (quoting *United States v. Springfield*, 829 F.2d 860, 862-63 (9th Cir. 1987)).

27. *See id.* at 1021-22.

28. *Id.* at 1023 (emphasis added).

29. *Id.* at 1024.

30. *See* *Gonzalo Palacios-Palacios*, No. A9-284-849, 1998 BIA LEXIS 44 (Dec. 18, 1998), 22 I. & N. Dec. 434 (B.I.A. 1998). *Gonzalo Palacios-Pinera* was sentenced to seven years in prison with three years of his sentence suspended. *Id.* at \*1. Aliens that are determined to be deportable by immigration judges have a right to appeal to the Board of Immigration Appeals, a review body created by the Attorney General's regulations. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 257 (4th ed. 1998). Most cases are decided by three-member panels appointed by the Attorney General. *Id.* at 257-58.

31. ALASKA STAT. § 11.46.400 (Michie 2000).

32. *Palacios*, 1998 BIA LEXIS 44, at \*6.

33. 269 F.3d 162 (3d Cir. 2001).

34. *Id.* Francis was convicted under a Pennsylvania statute, which stated:

resident of the United States for over twenty-five years, caused the deaths of two people in a traffic accident.<sup>35</sup> He was convicted of two counts of vehicular homicide and "was sentenced to two consecutive sentences of eighteen to sixty months in prison."<sup>36</sup> At the conclusion of his sentence, the INS initiated deportation proceedings, asserting that his conviction qualified as an aggravated felony.<sup>37</sup>

The Third Circuit stated that while in some instances a crime that is categorized as a misdemeanor may be considered an aggravated felony, this particular statute did not meet the criteria.<sup>38</sup> The court continued to examine whether, even if this offense could be regarded as a felony, it qualified as a crime of violence.<sup>39</sup> Answering in the negative, the court concluded that while the statute under which Francis was convicted *may* "'involve[] a substantial risk that physical force against the person or property of another may be used,'" it "does not, by its nature, require it."<sup>40</sup>

The Ninth Circuit was presented with the question of whether vehicular burglary is a crime of violence.<sup>41</sup> Sareang Ye was convicted of vehicular burglary under a California statute which read: "Every person who enters any . . . vehicle . . . when the doors are locked . . . with intent to commit grand or petit larceny or any felony is guilty of burglary."<sup>42</sup> Because use and attempted or threatened use of force are not elements

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Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth . . . applying to the operation or use of a vehicle . . . except section 3731 (relating to driving under influence of alcohol or controlled substance) is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.

75 PA. CONS. STAT. ANN. § 3732 (West 1996). Driving "'while his operating privilege was suspended'" was the attendant circumstance that fulfilled the condition precedent to Francis's criminal culpability. *Francis*, 269 F.3d at 172.

35. *Francis*, 269 F.3d at 164.

36. *Id.* at 165.

37. *Id.*

38. *Id.* at 166–74. The court reiterated its previous conclusion that "'certain misdemeanants who receive a sentence of one year,' even though the underlying crime has been labeled a 'misdemeanor' under state law" may qualify as aggravated felons under federal law. *Id.* at 167 (quoting *United States v. Graham*, 169 F.3d 787, 792 (3d Cir. 1999)). However, while such misdemeanor offenses may be considered felonies under § 16(a), § 16(b) specifically requires that the offense be a felony under state law. *Id.* at 168.

39. *Id.* at 171.

40. *Id.* at 174 (quoting 18 U.S.C. § 16(b) (2000)).

41. *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

42. *Id.* at 1130 n.1 (quoting CAL. PENAL CODE § 459 (West 1994)).

of the offense, the court was with the similar question of whether vehicular burglary, by its nature, involves a substantial risk that physical force would be used in the commission of the offense.<sup>43</sup>

As previously discussed, courts generally apply a categorical approach, looking only to the elements of the offense.<sup>44</sup> However, when the statute encompasses both conduct that would constitute a crime of violence and conduct that does not, courts look to the charging papers.<sup>45</sup> It was alleged that Ye had "entered a locked vehicle with intent to commit theft."<sup>46</sup> Therefore, the Ninth Circuit concluded that the real question was whether entry into a locked vehicle with intent to commit theft is, by its nature, a crime that involves a substantial risk that physical force will be used.<sup>47</sup> In concluding that Ye had not been convicted of a crime of violence,<sup>48</sup> the court reasoned that a crime of violence necessarily entails force that is violent in nature.<sup>49</sup> The court noted that numerous methods may be employed to commit vehicular burglary without using violent force, such as utilizing a stolen key or entering through an open window.<sup>50</sup>

The crimes of rape and sexual abuse of a minor, while specifically listed as crimes that qualify as aggravated felonies,<sup>51</sup> also fall under the crime of violence provision.<sup>52</sup> The Tenth Circuit, in *United States v. Reyes-Castro*,<sup>53</sup> considered whether a conviction for attempted sexual abuse of a minor qualifies as a crime of violence.<sup>54</sup> The court noted that "when an older person attempts to sexually touch a child . . . there is always a substantial risk that physical force will be used to ensure the child's compliance. Sexual abuse of a child is therefore a crime of

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43. *Id.* at 1133.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* *Contra* *United States v. Guzman-Landeros*, 207 F.3d 1034 (8th Cir. 2000) (holding that vehicular burglary is a crime of violence); *United States v. Rodriguez-Guzman*, 56 F.3d 18 (5th Cir. 1995) (holding the same).

49. *Ye*, 214 F.3d at 1133 (citing *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 n.10 (7th Cir. 2000)).

50. *Id.*

51. 8 U.S.C. § 1101(a)(43)(A) (2000).

52. *See, e.g., Guadarrama v. Perryman*, 48 F. Supp. 2d 782, 783–84 (N.D. Ill. 1999).

53. 13 F.3d 377 (10th Cir. 1993).

54. *Id.*



violence under 18 U.S.C. § 16(b)."<sup>55</sup> The court further emphasized that any crime, such as rape, that "involves a non-consensual act upon another person" is a crime of violence because there is a substantial likelihood that force will be used to effectuate compliance.<sup>56</sup> Under the categorical approach, it is irrelevant whether force is actually used.<sup>57</sup>

Applying the crime of violence statute in the context of the previously discussed crimes (arson, vehicular homicide, vehicular burglary, and attempted sexual abuse of a minor) yields a comparative perspective for considering the classification of drunk driving as a crime of violence. Given the grave consequences of deportation, it is important that the punishment fit the crime. Deportation for violent crimes, such as murder, rape, and similar crimes, is no doubt an appropriate measure. However, the application becomes less clear when considering crimes such as drunk driving and vehicular homicide. It is important to consider that, in at least one federal circuit, a conviction for vehicular homicide—where the life of another was taken—will not result in deportation.<sup>58</sup> Yet in other circuits, an alien may be deported based upon a drunk driving conviction that may or may not have resulted in the death of another.<sup>59</sup>

### III. THE CIRCUIT SPLIT: A CRIME OF VIOLENCE?

This section will review the circuit court decisions that have resulted in the current federal circuit split. A minority of the federal circuits have concluded that felony DWI does in fact give rise to a deportable crime of violence. After reviewing these decisions, this section will then focus on the analyses employed by the circuits that have concluded drunk driving does not constitute a crime of violence. It is clear that the issue of whether a crime of violence requires specific intent to use physical force is at the center of the circuit split.<sup>60</sup>

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55. *Id.* at 379.

56. *Id.* Of course, depending on the underlying statute, a conviction for rape may qualify as a crime of violence under § 16(a). However, not all rape statutes have the use, attempted, or threatened use of force as an element of the crime. In these cases, the offense satisfies § 16(b). For instance, rape is defined under Utah's statutes as "sexual intercourse with another . . . without the victim's consent." *Id.* (quoting UTAH CODE ANN. § 76-5-402(1) (1990)).

57. *Id.*

58. See *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001).

59. See *infra* Part III.A.

60. See *Rah*, *supra* note 13, at 2110–11.

*A. The Tenth and Eleventh Circuits*

The Tenth and Eleventh Circuits have both ruled that drunk driving qualifies as an aggravated felony based upon their determination that the offense constitutes a crime of violence.<sup>61</sup> However, the courts did not base their conclusions on the same provision in the definition of crime of violence. The Tenth Circuit held that driving under the influence qualifies as a crime of violence under § 16(b),<sup>62</sup> while the Eleventh Circuit determined that the offense constitutes a crime of violence under § 16(a).<sup>63</sup>

The Tenth Circuit convicted Jose Tapia-Garcia, a citizen of Mexico and a legal permanent resident of the United States, of driving under the influence (DUI) in 1998.<sup>64</sup> As a result, the INS instituted deportation proceedings.<sup>65</sup> An immigration judge concluded that the statutory definition of crime of violence includes DUI offenses, and the BIA agreed.<sup>66</sup> In *Tapia-Garcia v. INS*,<sup>67</sup> the Court of Appeals for the Tenth Circuit affirmed the BIA's determination and held that a DUI offense constitutes a crime of violence under § 16(b).<sup>68</sup> Therefore, according to the Tenth Circuit, a DUI is an aggravated felony and is an offense that subjects an alien to deportation.<sup>69</sup>

Tapia-Garcia argued that because drunk driving does not involve a "'substantial risk that physical force . . . may be used in the course of committing the offense,'" a DUI offense does not satisfy the statutory definition of a crime of violence.<sup>70</sup> The Tenth Circuit quickly dismissed this argument.<sup>71</sup> The court concluded that because of the inherent dangers of driving while intoxicated, the generic elements of the offense suggest that there would ordinarily be a risk that physical force would be

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61. *Tapia-Garcia v. INS*, 237 F.3d 1216, 1222–23 (10th Cir. 2001); *Le v. U.S. Attorney Gen.*, 196 F.3d 1352 (11th Cir. 1999).

62. *Tapia-Garcia*, 237 F.3d at 1223.

63. *Le*, 196 F.3d at 1354.

64. *Tapia-Garcia*, 237 F.3d at 1217. Tapia-Garcia was sentenced to five years in prison; however, he only served two months in prison. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1216.

68. *Id.* at 1223.

69. *Id.*

70. *Id.* at 1221 (quoting 18 U.S.C. § 16(b) (2000)).

71. While the court mentioned the language in § 16(b), it failed to undertake a thorough analysis of what this language entailed. *See id.* at 1221–23.

used.<sup>72</sup> Therefore, assuming the DUI offense could be classified as a felony, as it was in the instant case,<sup>73</sup> the offense would constitute a crime of violence.<sup>74</sup>

In *Le v. United States Attorney General*,<sup>75</sup> the Eleventh Circuit also held that DUI qualified as a crime of violence.<sup>76</sup> Duan Le, a citizen of Vietnam, was convicted of the felony charge of driving under the influence with serious bodily injury.<sup>77</sup> As a result, the court sentenced Le to thirty-three months of imprisonment.<sup>78</sup> The conviction, which encompassed a prison term of greater than one year, satisfied the first requirement for a finding of a deportable "crime of violence."<sup>79</sup>

In determining whether DUI qualified as a crime of violence, the court looked to the elements of the offense. The Florida statute under which Mr. Le was convicted contained two elements.<sup>80</sup> The first element required that the vehicle be operated by Le while he was intoxicated.<sup>81</sup> The second element required that his operation of the vehicle resulted in serious bodily injury to another.<sup>82</sup>

Without much elaboration, the court concluded that the operation of a vehicle resulting in serious bodily injury to another is an element of the overall offense that includes the actual use of force.<sup>83</sup> Thus, a conviction for driving under the influence with serious bodily injury satisfied the definition of crime of violence under § 16(a).<sup>84</sup> The government asserted that, even if the aggravating factor of serious bodily injury was absent, driving under the influence in and of itself presented a substantial risk that physical force would be used and thus

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72. *Id.* at 1222.

73. Tapia-Garcia was convicted of driving under the influence in violation of section 18-8004(5) of the Idaho Code. *Id.* at 1217. Tapia-Garcia was sentenced to five years in prison, but he only served two months. *Id.* However, even if the sentence is suspended or the sentence is not fully served, the one-year imprisonment requirement is satisfied under 8 U.S.C. § 1101(a)(43)(F). See Marley, *supra* note 9, at 868-69.

74. *Tapia-Garcia*, 237 F.3d at 1222.

75. 196 F.3d 1352 (11th Cir. 1999).

76. *Id.* at 1354.

77. *Id.* at 1353. Le was also convicted of a separate felony charge of driving with a suspended license with serious bodily injury. *Id.*

78. *Id.* at 1354.

79. See *id.*

80. *Id.* (Le was convicted under FLA. STAT. ANN. § 316.193(3) (West 1996)).

81. *Id.* (citing FLA. STAT. ANN. § 316.193(3) (West 1996)).

82. *Id.*

83. See *id.*

84. *Id.*

would be a crime of violence under § 16(b).<sup>85</sup> The Eleventh Circuit did not address this issue.<sup>86</sup>

Based on the Eleventh Circuit's conclusion that the offense constitutes a crime of violence under § 16(a), it is likely that the court would find felony DWI without bodily injury a crime of violence under § 16(b). If the court views the element of bodily injury as a result of the use of force, it will likely view the *risk* of that injury as a risk that physical force may be used within the terms of the statute.

### *B. The Second, Fifth, Seventh, and Ninth Circuits*

In *Dalton v. Ashcroft*,<sup>87</sup> the Second Circuit concluded that DWI is not a crime of violence, and is therefore not a deportable offense.<sup>88</sup> Thomas Dalton, a citizen of Canada who had been a legal permanent resident of the United States since 1958, was convicted of his third DWI under New York law in 1998.<sup>89</sup> The statute under which Dalton was convicted stated that "[n]o person shall operate a motor vehicle while in an intoxicated condition."<sup>90</sup> In 1999, while Dalton was serving his prison sentence, the INS initiated deportation proceedings, arguing that the DWI offense qualified as a deportable crime of violence.<sup>91</sup> The immigration judge agreed and ordered that Dalton be removed from the United States.<sup>92</sup> Dalton appealed this decision to the BIA, which affirmed the immigration judge's decision.<sup>93</sup> Dalton then appealed to the Second Circuit.<sup>94</sup>

The government conceded that Dalton's DWI conviction did not satisfy the § 16(a) definition of crime of violence.<sup>95</sup> Therefore, the Second Circuit was only presented with the question of whether the conviction satisfied § 16(b). The court stated that the language of § 16(b) mandates an analysis that looks only to the "intrinsic nature of the

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85. *Id.*

86. *Id.*

87. 257 F.3d 200 (2d Cir. 2001).

88. *Id.* at 108.

89. *Id.* at 202. Under New York law, the third conviction for driving while intoxicated within a ten-year period results in a felony DWI. *Id.* at 205 n.7 (citing N.Y. VEH. & TRAF. LAW § 1193(c)(ii) (Consol. 1992)).

90. *Id.* at 205 (quoting N.Y. VEH. & TRAF. LAW § 1192.3 (Consol. 1992)).

91. *Id.* at 203.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 203 n.5.

offense," rather than an analysis that focuses on the particular factual circumstances.<sup>96</sup>

Looking only to the nature of the offense, the court determined that there are numerous ways an individual may be convicted under New York's DWI statute without presenting a substantial "risk that force may be used."<sup>97</sup> For instance, the court noted that an individual can be convicted of driving while intoxicated if that person sleeps in the driver's seat of the car even if the car is not running.<sup>98</sup> Additionally, the vehicle does not even have to be in an operable condition to convict an individual of DWI.<sup>99</sup> Given these situations, the court concluded that drunk driving under New York law does not, by its intrinsic nature, necessarily present a risk that force may be used.<sup>100</sup>

Similarly, the Fifth Circuit, in *United States v. Chapa-Garza*,<sup>101</sup> analyzed whether DWI was a crime of violence under § 16(b).<sup>102</sup> However, the purpose of the court's analysis was to determine criminal sentencing as opposed to deportation.<sup>103</sup> The defendants in this case<sup>104</sup> pleaded guilty to unlawfully being in the United States after receiving a final order of deportation.<sup>105</sup> Prior to receiving their deportation orders, each of the defendants was convicted of DWI in violation of Texas law.<sup>106</sup> Following the United States Sentencing Guidelines section 2L1.2, which provides for an increase in sentencing if the defendant was convicted of an aggravated felony prior to deportation, the defendants received enhanced sentences.<sup>107</sup> The defendants appealed their sentence enhancements, arguing that a DWI offense is not a crime of violence and thus, is not an aggravated felony.<sup>108</sup>

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96. *Id.* at 204. This approach is generally referred to as the categorical approach. *Id.*

97. *Id.* at 205.

98. *Id.* (citing *People v. Marriott*, 325 N.Y.S.2d 177 (App. Div. 1971)).

99. *Id.* (citing *People v. David "W"*, 442 N.Y.S.2d 278 (App. Div. 1981)).

100. *See id.*

101. 243 F.3d 921 (5th Cir. 2001).

102. *Id.* at 924-28.

103. *Id.*

104. The court consolidated the cases of numerous defendants as each presented the same issue—whether driving while intoxicated is an aggravated felony under the U.S. SENTENCING GUIDELINES MANUAL § 2L1.2. *Chapa-Garza*, 243 F.3d at 923.

105. *Chapa-Garza*, 243 F.3d at 923. The defendants were in violation of 8 U.S.C. § 1326(a). *Chapa-Garza*, 243 F.3d at 923.

106. *Chapa-Garza*, 243 F.3d at 923.

107. *Id.* at 923 n.3 (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1997)).

108. *See id.* at 923.

This particular provision of the Sentencing Guidelines provides that an "[a]ggravated felony is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony."<sup>109</sup> Therefore, whether a DWI is an aggravated felony depends on whether it is considered a crime of violence under § 16.<sup>110</sup> The Fifth Circuit considered two interpretations of the language in § 16(b). The government asserted that § 16(b) should be interpreted in the same fashion as United States Sentencing Guidelines section 4B1.2(a)(2).<sup>111</sup> Under this interpretation, "any offense that involves . . . a conscious disregard of a substantial risk of injury to others, is a crime of violence."<sup>112</sup> Under the alternative interpretation, an offense is a crime of violence "only when the nature of the offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property in the commission thereof."<sup>113</sup>

The court rejected the first interpretation, stating that this particular section of the Sentencing Guidelines contains broader language than § 16(b).<sup>114</sup> The court stated that section 4B1.2(a)(2) requires only that the offense involve *conduct* that presents a serious risk of injury to another, whereas § 16(b) requires "that there be a substantial risk that the defendant will *use* physical force against another's person or property *in the course of committing the offense*."<sup>115</sup> Applying this interpretation to felony DWI, the court stated that intentional force is rarely, if ever, used to commit the offense and, therefore, it is not a crime of violence under § 16(b).<sup>116</sup>

The Seventh Circuit reached a similar conclusion in *Bazan-Reyes v. INS*,<sup>117</sup> holding that drunk driving is not a crime of violence, even when the conviction is for homicide by intoxicated use of a vehicle.<sup>118</sup> The

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109. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. n.1 (1997)).

110. 8 U.S.C. § 1101(a)(43) enumerates specific crimes that constitute aggravated felonies. One such provision states that an aggravated felony is a crime of violence as defined in 18 U.S.C. § 16. *Chapa-Garza*, 243 F.3d at 923.

111. *Chapa-Garza*, 243 F.3d at 925.

112. *Id.*

113. *Id.*

114. *Id.* at 924.

115. *Id.* at 925.

116. *Id.* at 928.

117. 256 F.3d 600 (7th Cir. 2001).

118. *Id.* This case presented one issue: whether state drunk driving convictions are aggravated felonies for purposes of deportation. *Id.* at 602. The cases of three aliens were

court rejected INS's contention that a crime of violence is any felony that involves a substantial risk that force will be exerted upon another.<sup>119</sup> The court reasoned that such an interpretation would effectively make any felony offense that carries a substantial risk of harm a crime of violence "because physical harm is nearly always the result of some type of physical force."<sup>120</sup> For example, a conviction for involuntary manslaughter caused by speeding would be a crime of violence, although few people would consider this a violent offense.<sup>121</sup>

The court opted to interpret § 16(b) as requiring a reckless disregard for the risk that physical force will be employed intentionally in the course of committing the offense.<sup>122</sup> The court stated that this criterion is not satisfied by such intentional acts as "opening the car door or pressing the accelerator."<sup>123</sup> Rather, the conduct must involve actual violent force to constitute physical force.<sup>124</sup> The Seventh Circuit concluded that because intentional force is not used to commit drunk driving offenses, even those resulting in the death of a third party, such offenses are not crimes of violence within the meaning of § 16(b).<sup>125</sup>

Finally, the Ninth Circuit held in *United States v. Trinidad-Aquino*<sup>126</sup> that a conviction for driving under the influence of alcohol causing bodily injury does not rise to the level of a crime of violence under § 16(b).<sup>127</sup> Miguel Trinidad-Aquino pled guilty to illegally reentering the United States, in violation of 8 U.S.C. § 1326, after having been

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consolidated because they presented the same issue. *Id.* In 1999, Jose Bazan-Reyes, a Mexican citizen, pleaded guilty to Operating a Vehicle While Intoxicated in violation of section 9-30-5-3 of the Indiana Code. *Id.* He was sentenced to three years in prison. *Id.* at 603. In 1997, Arnaldo Gomez-Vela, also a Mexican citizen, was arrested for DUI. *Id.* He was charged with aggravated DUI because he had been previously convicted of drunk driving two times. *Id.* "Gomez-Vela pleaded guilty and was sentenced to twenty-six months in prison." *Id.* at 603-04. In 1998, Wincenty Maciasowicz pleaded guilty to two counts of homicide by intoxicated use of a vehicle in violation of section 940.09 of the Wisconsin Statutes and was sentenced to five years on the first count and ten years on the second count, to be served consecutively. *Id.* at 603. In each case, the INS initiated deportation proceedings, finding that the offenses were crimes of violence, and as a result, each alien was deportable as an aggravated felon. *Id.* at 602-04.

119. *See id.* at 610.

120. *Id.*

121. *Id.*

122. *Id.* at 612.

123. *Id.* at 611.

124. *Id.*

125. *Id.* at 612.

126. 259 F.3d 1140 (9th Cir. 2001).

127. *Id.* at 1146.

previously deported.<sup>128</sup> At the time, the Sentencing Guidelines provided that a defendant may receive a sixteen-level increase in sentencing if the defendant was deported after being convicted for an aggravated felony.<sup>129</sup> This particular provision of the Sentencing Guidelines adopts the definition of aggravated felony contained in 8 U.S.C. § 1101(a)(43).<sup>130</sup> Therefore, the process used to determine whether an offense is an aggravated felony in this situation is identical to that used for deportation.<sup>131</sup>

Trinidad-Aquino was convicted under a California statute that reads in part:

It is unlawful for any person, while under the influence of any alcoholic beverage . . . to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.<sup>132</sup>

The government contended that Trinidad-Aquino's DUI conviction qualified as a crime of violence, and thus subjected him to the sentencing enhancement.<sup>133</sup>

However, the government conceded that this statute could be violated through negligent acts, as long as the driver was intoxicated when the negligent acts were committed.<sup>134</sup> Although the Ninth Circuit had previously held that an offense with a reckless mens rea could satisfy the § 16(b) definition of crime of violence,<sup>135</sup> the court refused to extend the definition to include offenses involving negligent conduct.<sup>136</sup> The court reasoned that the "substantial risk that force may be used" language of § 16(b) requires a volitional act.<sup>137</sup> However, the court did not go as far as other circuits have in requiring intentional conduct.<sup>138</sup>

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128. *Id.* at 1142.

129. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1997)).

130. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. n.2 (2002).

131. *See Trinidad-Aquino*, 259 F.3d at 1142-43.

132. *Id.* at 1143 (quoting CAL. VEH. CODE § 23153(a) (West 2000)).

133. *See id.* at 1142.

134. *Id.* at 1143.

135. *Id.* at 1144 (citing *United States v. Ceron-Sanchez*, 222 F.3d 1169 (9th Cir. 2000) (finding that a conviction for aggravated assault qualified as a crime of violence)).

136. *Id.*

137. *Id.* at 1145.

138. *Id.* at 1146.



*C. Other Circuits Hint How They May Decide*

While not yet directly deciding the issue, some of the remaining circuits have hinted how they might decide this issue. For instance, the Third Circuit, in *United States v. Parson*,<sup>139</sup> analyzed whether a recklessly endangering conviction was a crime of violence under the much broader United States Sentencing Guidelines.<sup>140</sup> The court affirmed the lower court's decision that the conviction qualified as a crime of violence and thus subjected the defendant to sentencing enhancement.<sup>141</sup> Therefore, under section 4B1.2 of the Sentencing Guidelines, a reckless mens rea is sufficient to support a finding that an offense is a crime of violence.<sup>142</sup>

However, the court noted that the result is different when analyzing the offense under the narrower definition of crime of violence as detailed in § 16(b).<sup>143</sup> The court stated that, under § 16(b), an offense with a reckless mens rea would not always qualify as a crime of violence.<sup>144</sup> More importantly, the Third Circuit specifically noted that drunk driving offenses would not qualify as crimes of violence.<sup>145</sup> Instead, the court stated that, to qualify as a crime of violence under § 16(b), the offense must present a substantial risk that *intentional* force will be used.<sup>146</sup>

However, in an unpublished opinion, the Sixth Circuit, in *United States v. Santana-Garcia*,<sup>147</sup> held that the definition of crime of violence encompasses a drunk driving conviction.<sup>148</sup> In 1994, Ismael Santana-Garcia was at fault in a car accident that resulted in the death of a man.<sup>149</sup> Santana-Garcia's blood alcohol level was determined to be .284%, and he was convicted of driving under the influence and sentenced to six years in prison.<sup>150</sup> In 1996, after serving his prison term, Santana-Garcia was deported.<sup>151</sup> Approximately one month later, he

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139. 955 F.2d 858 (3d Cir. 1992).

140. *Id.* at 860.

141. *Id.*

142. *See id.* at 860-61.

143. *See id.* at 866.

144. *See id.*

145. *See id.*

146. *See id.*

147. No. 98-2234, 2000 U.S. App. LEXIS 7285 (6th Cir. Apr. 18, 2000).

148. *Id.* at \*8.

149. *Id.* at \*2.

150. *Id.*

151. *Id.*

illegally reentered the United States.<sup>152</sup> In 1998, Santana-Garcia was arrested and charged with operating a motor vehicle while under the influence, to which he pled guilty.<sup>153</sup> Again, pursuant to the United States Sentencing Guidelines, the district court enhanced his offense by sixteen levels, determining that his previous drunk driving conviction was an aggravated felony.<sup>154</sup>

Upon appeal, Santana-Garcia argued that his previous conviction did not rise to the level of a crime of violence and thus was not an aggravated felony.<sup>155</sup> The Sixth Circuit, in a conclusory fashion, disagreed and affirmed the district court's holding.<sup>156</sup> The court's analysis was short at best:

This prior conviction is both "an offense that has [as] an element the use . . . of physical force against the person or property of another," *see* 18 U.S.C. § 16(a), and "an offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *see* 18 U.S.C. § 16(b).<sup>157</sup>

The court continued by citing other cases, both within and outside of the Sixth Circuit, which found DUI and involuntary manslaughter offenses to be crimes of violence within the meaning of § 16.<sup>158</sup> However, the court failed to execute its own thorough analysis.

Additionally, as discussed in Part II, the Ninth Circuit in *Park* held that a reckless state of mind is sufficient to find an offender guilty of committing a crime of violence.<sup>159</sup> However, the Santana-Garcia court reconciled this decision with its holding in *Trinidad-Aquino*,<sup>160</sup> which held that while a reckless state of mind satisfies the definitional requirement of crime of violence, a purely negligent mens rea would not sustain the finding of a crime of violence.<sup>161</sup> Instead, the court noted that

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152. *Id.*

153. *Id.* at \*2-3.

154. *Id.* at \*3.

155. *Id.* at \*5-6.

156. *Id.* at \*9-10.

157. *Id.* at \*7.

158. *See id.* at \*7-8.

159. *Park v. INS*, 252 F.3d 1018, 1024 (9th Cir. 2001).

160. *United States v. Trinidad-Aquino* 259 F.3d 1140 (9th Cir. 2001); *see also supra* notes 126-38 and accompanying text.

161. *Trinidad-Aquino*, 259 F.3d at 1145.

in order to sustain a finding of a crime of violence, there must be, at a minimum, "a volitional act equivalent to recklessness."<sup>162</sup> However, the court was careful to point out the distinction between an intentional act and a volitional act.<sup>163</sup> The court reiterated its position that in order to find an offense within the definition of crime of violence, the offense need not be committed with specific intent.<sup>164</sup> A mere reckless state of mind will suffice.<sup>165</sup> However, because the particular offense that Trinidad-Aquino was convicted of required merely a negligent state of mind, the offense did not fall within the definition of a crime of violence.<sup>166</sup> Until the *Trinidad-Aquino* case was released, many in the legal community assumed that because of the holding in *Kyung Park*, the Ninth Circuit would hold that drunk driving was indeed a crime of violence.<sup>167</sup>

#### IV. ANALYSIS: DRUNK DRIVING—A CRIME OF VIOLENCE?

While the majority of the circuits have held that drunk driving convictions, or other offenses with a negligent or reckless mens rea, are not crimes of violence, a minority of the circuits have held otherwise. Given the severity of deportation as a punitive measure, this issue must be examined carefully.

Additionally, and for the same reason, uniformity should exist throughout the circuits. An individual living in the Tenth Circuit's jurisdiction could be deported for an offense that would not subject an individual living within the Seventh Circuit's jurisdiction to deportation. This discrepancy alone is sufficient to support an examination by the Supreme Court. In the event that the Court is presented with this issue, it should follow the better-reasoned argument that a drunk driving conviction is not a crime of violence within the meaning of § 16.

##### A. Statutory Construction: The Meaning of "Use"

The canons of statutory construction require courts to give the language used in a particular statute its plain and ordinary meaning.<sup>168</sup>

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162. *Id.* at 1146.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Mason, *supra* note 16, at 1.

168. *See, e.g., INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

A departure from this general rule is only appropriate where "there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended."<sup>169</sup>

In construing § 16, the courts have generally undertaken an analysis of the word "use."<sup>170</sup> *Black's Law Dictionary* defines "use" in part as: "To make use of . . . to employ . . . to utilize; to carry out a purpose or action by means of."<sup>171</sup> Arguing that the word "use" encompasses negligent conduct blatantly contradicts the word's ordinary and accepted meaning. As stated by the Ninth Circuit, "[i]n ordinary, contemporary, and common parlance, the 'use' of something requires a volitional act."<sup>172</sup> "[A] drunk driving accident is not the result of plan, direction, or purpose but of recklessness at worst and misfortune at best. A drunk driver who injures a pedestrian would not describe the incident by saying he 'used' his car to hurt someone."<sup>173</sup>

Furthermore, in order for an offense to qualify as a crime of violence under § 16(b), it is not sufficient that there be a substantial risk that physical force will be used; rather, there must be a substantial risk that the physical force will be used against the person or property of another.<sup>174</sup> Therefore, in order for a drunk driving conviction to satisfy the definition, the volitional act must refer to the actual or potential impact or collision.<sup>175</sup> It is not sufficient to deem as volitional conduct the act of starting the car or other such conduct that is a condition precedent to the risk of harm or to actual harm.<sup>176</sup> If the acts of starting the engine of a car or placing a foot on the gas pedal were alone sufficient to satisfy the volitional conduct requirement, then every felony violation of the law with respect to automobiles would qualify as a crime of violence.<sup>177</sup> The Second Circuit most clearly articulated the

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169. *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting).

170. *See, e.g., Trinidad-Aquino*, 259 F.3d at 1145.

171. *Id.* (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).

172. *Id.* *But see* Rah, *supra* note 13, at 2138–39 (arguing that "use" encompasses non-intentional conduct). One individual has argued that the passive language "may be used" indicates that the legislature did not intend § 16(b) to require specific intent. *See id.* This argument is unpersuasive, however, as the language merely indicates that it is irrelevant whether or not force is actually used. The offense, by its nature, must simply present a risk that force may be used.

173. *United States v. Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995).

174. *Trinidad-Aquino*, 259 F.3d at 1145.

175. *Id.*

176. *See id.*

177. *Dalton v. Ashcroft*, 257 F.3d 200, 206 (2d Cir. 2001).

inherent flaw in holding § 16(b) to include drunk driving offenses, stating:

[W]e believe the language of § 16(b) fails to capture the nature of the risk inherent in drunk driving. This risk is, notoriously, the risk on an ensuing accident; it is not the risk that the driver will "use physical force" in the course of driving the vehicle. Indeed, in the context of driving a vehicle, it is unclear what constitutes the "use of physical force." The physical force used cannot reasonably be interpreted as a foot on the accelerator or a hand on the steering wheel. Otherwise, all driving would, by definition, involve the use of force, and it is hard to believe that Congress intended for all felonies that involve driving to be "crimes of violence."<sup>178</sup>

Both the Tenth and Eleventh Circuits held that even offenses containing merely a negligent mens rea, such as some drunk driving statutes, can be crimes of violence under § 16, but neither of these courts undertook an analysis of whether the statutory language of the word use requires a volitional act.<sup>179</sup> In fact, every circuit that has employed such an analysis has concluded that use requires volitional conduct, either reckless or intentional in nature.<sup>180</sup>

#### *B. Insight from the U.S. Sentencing Guidelines*

An examination of the Career Offender Guideline, section 4B1.2 of the United States Sentencing Guidelines, may provide some insight into whether drunk driving is a crime of violence for purposes of deportation. The Guidelines provide that a crime of violence is:

[A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is burglary of a dwelling, arson, or extortion, involves use of

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178. *Id.*

179. *Trinidad-Aquino*, 259 F.3d at 1146. Neither *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001), nor *Le v. United States*, 196 F.3d 1352 (11th Cir. 1999), analyzed whether the statutory language of "use" requires volitional conduct.

180. *Trinidad-Aquino*, 259 F.3d at 1146.

explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.<sup>181</sup>

At first glance, this definition of crime of violence appears to be very similar to the definition under § 16(b).<sup>182</sup> However, upon closer examination, there are marked differences between the second prongs of each definition.<sup>183</sup> The definition contained in the Sentencing Guidelines is much broader<sup>184</sup> and merely "requires that the offense involve conduct that poses a serious risk of physical injury to another person."<sup>185</sup> Section 4B1.2(a)(2) is concerned only with the *effect* of particular conduct.<sup>186</sup> However, § 16(b) is centered on the *conduct* itself, without regard to whether there is a substantial risk of injury to another's person or property.<sup>187</sup> Section 16(b) is much narrower, requiring that there be a substantial risk that physical force will be used against another's person or property in the course of committing the offense.<sup>188</sup>

The Tenth Circuit, in finding DWI a crime of violence under § 16, focused only on the potential *effect* of driving under the influence.<sup>189</sup> The court concluded that DWI is a crime of violence because of the potential serious risk of injury to others.<sup>190</sup> Apparently, the court decided that because physical harm is almost always the result of the use of physical force, conduct that presents serious risk of harm to another is sufficient to satisfy the requirement of § 16(b).<sup>191</sup>

Likewise, the Eleventh Circuit, in holding that the offense of DUI with resulting bodily injury is a crime of violence under § 16(a), focused on the *effect* of the offense rather than on the conduct itself.<sup>192</sup> The two elements of the offense, intoxicated operation of a vehicle and resulting

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181. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2001).

182. *See, e.g.,* Francis v. Reno, 269 F.3d 162, 173–74 (3d Cir. 2001).

183. *See id.*

184. Bazan-Reyes v. INS, 256 F.3d 600, 610 (7th Cir. 2001).

185. United States v. Chapa-Garza, 243 F.3d 921, 925 (5th Cir. 2001).

186. *Id.*

187. *Id.*

188. *Id.* *See Gonzalo Palacios-Palacios*, No. A90-284-849, 1998 BIA LEXIS 44 (Dec. 18, 1998), 22 I. & N. Dec. 434 (B.I.A. 1998) for a discussion of the difference between the risk of physical injury to another and a substantial risk that force will be used.

189. *See* Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).

190. *See id.*

191. *See id.*

192. *See* Le v. U.S. Attorney Gen., 193 F.3d 1352 (11th Cir. 1999).

serious bodily injury, cannot be said to include the use of force as an element. While not decided by the Eleventh Circuit, it is quite apparent from the opinion in *Le* that the court would conclude that a DUI conviction, without the element of bodily injury, would nevertheless constitute a crime of violence under § 16(b).<sup>193</sup>

It appears that the Tenth Circuit has interpreted, and the Eleventh Circuit would interpret, § 16(b) in the same fashion that section 4B1.2 is interpreted. However, not only does the different language suggest that § 16(b) and section 4B1.2 of the Guidelines cover different offenses, but the legislative history of section 4B1.2 also counsels against such an interpretation.<sup>194</sup> Guideline 4B1.2(a) originally incorporated the definition of a crime of violence into § 16(b).<sup>195</sup> On November 1, 1989, this reference was eliminated and the current definition that appears in the statute became effective.<sup>196</sup> The mere fact that the definition was revised conclusively demonstrates that the two statutes cover different types of conduct.

Moreover, Congress instructed the Sentencing Commission to ensure that criminals convicted of certain offenses, including crimes of violence as defined by § 16(b), receive near-maximum sentences.<sup>197</sup> The legislative history also suggests that Congress left room for the Commission to expand the type and number of offenses that are subject to the Career Offender Guideline.<sup>198</sup> The Senate Report stated that its directive was "not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment."<sup>199</sup> Therefore, it is reasonable to conclude that the Commission intended the revised definition to encompass a broader range of conduct—conduct that merely presents a serious potential risk of injury to another.<sup>200</sup>

### *C. Construing Ambiguities in Favor of the Alien*

The Supreme Court has a longstanding principle of construing

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193. *See supra* Part III.A.

194. *Chapa-Garza*, 243 F.3d at 926.

195. *Id.*

196. *Id.*

197. *United States v. Parson*, 955 F.2d 858, 866–67 (3d Cir. 1992).

198. *Id.* at 867.

199. *Id.* (quoting S. REP. NO. 98-225, at 176 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3359).

200. *See id.*

ambiguous deportation statutes in favor of the alien.<sup>201</sup> Such deference is granted because the punitive nature of deportation is so severe.<sup>202</sup> The Court has explained its rationale, stating that "since the stakes are considerable for the individual, we will not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."<sup>203</sup> Therefore, assuming *arguendo* that the language of § 16(b) is ambiguous, the courts should assign "use" its narrowest possible meaning.

Besides the punitive nature of deportation, the justification for construing deportation statutes in favor of the alien should be based on one of our nation's immigration policies—to keep families together.<sup>204</sup> As of 1996, over 11.7 million permanent legal residents had not been naturalized,<sup>205</sup> leaving them vulnerable to deportation. Many aliens have been residents of the United States for decades when the government initiates deportation proceedings against them.<sup>206</sup> After years as permanent United States residents, these individuals have developed strong ties. They have families, friends, and jobs. Deportation may result in the loss of a family's breadwinner or the loss of a mother or father.<sup>207</sup> When the government initiates deportation proceedings for offenses such as drunk driving, we must ask ourselves whether we are really solving a problem or just creating a new one.

## V. CONCLUSION

There is no doubt that drunk driving is a serious and dangerous offense. In the year 2000 alone, over 16,000 people died in alcohol-related traffic accidents.<sup>208</sup> Estimates indicate that every thirty-two

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201. *E.g.*, *INS v. Elias-Zacarias*, 502, U.S. 478, 487 (1992) (Stevens, J., dissenting); *INS v. Errico*, 385 U.S. 214, 225 (1966); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

202. *Errico*, 385 U.S. at 225 (Stewart, J., dissenting).

203. *Fong Haw Tan*, 333 U.S. at 10.

204. Morawetz, *supra* note 4, at 1950. Morawetz also provides a discussion of the impact that the 1996 deportation laws have on families. *Id.* at 1950–54.

205. Dick Kirschten, *American Dreamers*, 29 NAT'L J. 1364, 1364 (1997). Out of 19.9 million legal permanent residents, only 8.2 million had been naturalized as of 1996. *Id.*

206. See George M. Anderson, *New Tides of Immigration; Immigrants and Labor Unions*, AMERICA, July 1, 2000, at 12.

207. Morawetz, *supra* note 4, at 1951–53. For a discussion on the impact of deportation on families, see *id.* at 1950–54.

208. Insurance Information Institute, *Hot Topics & Insurance Issues*, at <http://www.iii.org/media/hottopics/insurance/drunk/> (last visited Nov. 18, 2002).



minutes there is an alcohol-related fatality.<sup>209</sup> However, courts should not interpret § 16(b) to encompass DWI offenses solely because of these figures. Simply put, the statute enacted by Congress does not include drunk-driving offenses. The Tenth and Eleventh Circuits' analyses, or lack thereof, suggest that its judicial decision-making processes were tainted by personal views on drunk driving. A thorough, legal analysis based on statutory construction, legislative history, and social policy results in the conclusion that § 16(b) requires that the statute under which an individual is convicted encompass, at a minimum, reckless conduct, but ideally specific intent.

Courts should not make legal determinations in a conclusory fashion, especially when dealing with the severe consequence of deportation. A thorough, legal analysis is required to ensure that the law is fairly and properly enforced. As stated by the Second Circuit, drunk driving is "an urgent, nationwide problem of staggering proportion. But by shoehorning such reprehensible conduct into criminal statutes that were not designed to hold it, we risk an equivalent harm of usurping federal and state legislative roles."<sup>210</sup>

Congress, of course, has the authority to specifically enumerate drunk driving as a deportable offense. However, such a decision would inflict a punishment disproportionate to the crime. Consider for a moment that in 1999, the number of individuals arrested for drunk driving was nearly 1.5 million.<sup>211</sup> That works out to approximately one arrest in every 121 drivers in the United States.<sup>212</sup> Of those, approximately one-third are repeat offenders (generally one must be a repeat offender to be convicted of a DWI felony).<sup>213</sup> These repeat offenders often do not face more than one year of imprisonment.<sup>214</sup> Yet, the Tenth and Eleventh Circuits seek to punish these individuals with one of the most severe forms of punishment—deportation.

Our treatment of citizens should serve as a point of reference for determining how to treat non-citizens convicted of the same crimes. This is not to say that citizens and non-citizens should necessarily be treated in the exact same fashion, but such a disparity in treatment may

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209. *Id.*

210. *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001).

211. Insurance Information Institute, *Hot Topics & Insurance Issues*, at <http://www.iii.org/media/hottopics/insurance/drunk/> (last visited Nov. 18, 2002).

212. *Id.*

213. *Id.*

214. *See, e.g.*, WIS. STAT. § 346.65 (2001–2002).

be indicative of an over-reaching statute. Congress did not intend such offenses to be included in § 16<sup>215</sup> nor *should* Congress amend the statute to encompass drunk driving as a deportable offense.<sup>216</sup>

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215. *See supra* Part IV.B.

216. *Contra* Rah, *supra* note 13, at 2146–47 (arguing that Congress should amend 8 U.S.C. § 1101(a)(43)(F) to incorporate the definition of crime of violence found in the United States Sentencing Guidelines, thereby including felony DWI as a crime of violence).

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